

Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

1 BOMBARDIER INC.,
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Plaintiff,

9 v.
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12 MITSUBISHI AIRCRAFT CORPORATION,
13 MITSUBISHI AIRCRAFT CORPORATION
14 AMERICA INC., AEROSPACE TESTING
15 ENGINEERING & CERTIFICATION INC.,
16 MICHEL KORWIN-SZYMANOWSKI,
17 LAURUS BASSON, MARC-ANTOINE
18 DELARCHE, CINDY DORNÉVAL, KEITH
19 AYRE, AND JOHN AND/OR JANE DOES 1-
20 88,
21
22

Defendants.

No. 2:18-cv-01543-JLR

BOMBARDIER INC.'S REPLY
TO DEFENDANTS KEITH AYRE
AND MARC-ANTOINE
DELARCHE'S OPPOSITION TO
BOMBARDIER INC.'S MOTION
TO SEAL THE DECLARATION
OF MICHAEL BORFITZ AND
EXHIBITS A, B, F-I, K, AND L
TO THE DECLARATION OF
JEFFREY DANLEY

NOTE ON MOTION

CALENDAR:

JUNE 14, 2019

I. ARGUMENT

In light of this Court’s order on various motions to seal (Order, Dkt. # 111), which dispatched nearly identical arguments as those now raised by Defendants Ayre and Delarche (“Defendants”), Bombardier’s Motion to Seal (“Motion,” Dkt. # 215) should have been stipulated. However, despite this Court’s prior admonishment of imposing a “disproportionate burden on judicial resources,” (Order, Dkt. # 218) Defendants have maintained positions similar to those that have failed earlier in the case, thereby requiring otherwise unnecessary briefing. As set forth below, Defendants’ arguments are unavailing.

A. Bombardier's Motion Is Not "Vague"

Defendants misguidedly criticize Bombardier of lodging “vague contentions” supporting its Motion, and they incorrectly assert that “[t]here are no such articulable facts” in the Motion to justify adopting Bombardier’s requested redactions. (*See* Opp’n, Dkt. # 234, at 3-4.) More accurately, Bombardier and its expert, Mr. Michael Borfitz, explained that Exhibits A, B, F-I, K, and L to the Danley Declaration would be commercially valuable to competitors of Bombardier. (*See* Motion, Dkt. # 215, at 3-4; Borfitz Decl., Dkt. # 197, ¶¶ 7-13.) By discussing the commercial value to competitors in detail, Bombardier and Mr. Borfitz addressed “the legitimate private or public interests that warrant the relief sought” and “the injury that will result if the relief sought is not granted.” LCR 5(g)(3)(B). Moreover, Bombardier explained that these documents are “closely related” to the trade secrets at issue (Motion, Dkt. # 215, at 3), thereby satisfying LCR 5(g)(3)(B)(iii)’s requirement as to “why a less restrictive alternative to the relief sought is not sufficient.” Therefore, Defendants’ contention that Bombardier merely submitted vague assertions is without merit.

B. A Compilation Is Comprised of Individual Pieces of Information

Throughout their Opposition, Defendants ignore this Court’s prior order that criticized MITAC America of putting “the cart before the horse” by arguing the merits of Bombardier’s trade secret case in the context of a motion to seal. (*See* Order, Dkt. # 111, at 14.) Specifically, Defendants erroneously assert that Bombardier “has not articulated what secret

1 compilation any particular publicly available document is a part of or explained how such
 2 compilation is unique or how it was compiled” (Opp’n, Dkt. # 234, at 4-5.) In addition to
 3 arguing the merits in an improper procedural context, Defendants’ assertion also ignores the
 4 Court’s previous ruling that “at this stage, Bombardier has identified its alleged trade
 5 secrets—which rely in part on a compilation theory—with enough specificity.” (Order, Dkt. #
 6 111, at 14.)

7 Further, Defendants ignore yet another part this Court’s prior ruling: “[f]or purposes of
 8 determining if compelling reasons exist to seal the disputed material, the court only needs to
 9 find that the material ‘***might*** . . . release trade secrets.’” (Order, Dkt. # 111, at 14 (quoting
 10 *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (emphasis
 11 added).) Specifically, Defendants put forth the untenable notion that every single redaction ***on***
 12 ***its own*** must be Bombardier’s ***compilation*** of trade secrets in order to justify keeping
 13 Bombardier’s requests sealed from the public record. (*See, e.g.*, Opp’n, Dkt. # 234, at 4, 6,
 14 and 8.) Defendants offer no support for this assertion (as they indeed cannot), and they
 15 instead attempt to stretch a statement of law from *United States v. Nosal*, 844 F.3d 1024, 1042
 16 (9th Cir. 2016) that is irrelevant to the question of whether documents should be filed under
 17 seal. (*See* Opp’n, Dkt. # 234, at 4.) While true that “the secrecy of the claimed trade secret as
 18 a whole” is “determinative” on the ultimate ***merits*** of a trade secret misappropriation case
 19 (*Nosal*, 844 F.3d at 1042 (quoting Restatement (Third) of Unfair Competition § 39 cmt. f
 20 (1995))), it is not determinative on the question to seal documents from the public; and it does
 21 not support the notion that an alleged wrongdoer may eviscerate a compilation by publicly
 22 disclosing its underlying components piece-by-piece in a motion-to-seal context. (*See* Order,
 23 Dkt. # 111, at 14.)

24 C. The Redacted Information Is Properly Sealed

25 ***Exhibit A: “2013 Transport Canada” Email.*** Exhibit A to the Danley Declaration is
 26 an un-redacted version of a portion of Exhibit S to Bombardier’s First Amended Complaint
 27 (“FAC”) (*Compare* Dkt. # 216, *and* Dkt. # 196-1, *with* Dkt. # 143-19) and has been discussed

1 in briefing related to at least one other motion to seal. (*See, e.g.*, Dkt. # 227, at 3.) In brief, this
 2 email discusses alternative means that Bombardier discussed with Transport Canada
 3 (“TCCA”) for testing certain safety systems in Bombardier’s aircraft. This exchange between
 4 Mr. Ayre and TCCA cannot be readily ascertainable by the general public because it was
 5 direct and confidential correspondence concerning systems specific to Bombardier. (*See, e.g.*,
 6 Waterhouse Decl., Dkt. # 89, ¶¶ 21, 29 (identifying exchange with Transport Canada as
 7 “confidential”); *see also* Borfitz Decl., Dkt. # 197, ¶ 12 (same).) Bombardier invested time
 8 and resources to discover which publicly available information would be most pertinent to its
 9 certification efforts; it would be injured if a competitor gained an unfair advantage by learning
 10 this information absent a comparable investment of time and resources.

11 Next, Defendants argue that “Bombardier [itself] implies . . . that it inadvertently made
 12 the discussed disclosures in its own public filings,” but the citation Defendants use in support
 13 reveals nothing of the sort. (*See Opp’n*, Dkt. # 234, at 6 n.2 (citing “ECF No. 227, at 3:13-
 14 17”).) Even a cursory reading of Bombardier’s position readily shows that Bombardier was
 15 merely identifying the broad protections of the Protective Order, not that it had already
 16 publicly disclosed sensitive information.

17 Further, Defendants incorrectly use hindsight to argue that the information contained
 18 in the TCCA email can be easily found through an internet search. (*See Opp’n*, Dkt. # 234, at
 19 6-7 (discussing models of equipment, advisory circulars, and FAA regulations).) Defendants’
 20 counsel were able to expediently discover the equipment models, advisory circulars, and FAA
 21 regulations *only after* viewing Bombardier’s identification of them. Unlike Defendants’
 22 counsel, Bombardier did not have the luxury of hindsight to arrive at this information in the
 23 first instance. Disclosing the information to the public as Defendants request would unfairly
 24 compromise Bombardier’s substantial investment of time and resources expended in
 25 gathering such information. Further still, Defendants appear to maintain that 14 C.F.R. Part 25
 26 represents the entire universe of relevant regulations for aircraft certification. (*See Opp’n*,
 27 Dkt. # 234, at 7.) But as this Court is well-aware, even Part 25 is just *one* set of rules that

1 must be addressed during aircraft certification. (*See, e.g.*, FAC, Dkt. # 143, ¶ 29 (citing 14
 2 C.F.R. Parts 21, 25, 34, and 36).) Indeed, Defendants' own cited URL indicates that 84
 3 advisory circulars are associated *just* for airworthiness. (*See* Opp'n, Dkt. # 234, at 7 n.4.)

4 Finally, Defendants' argument concerning the ability to reverse-engineer the
 5 information at issue is irrelevant in this Circuit: “[T]he theoretical possibility of
 6 reconstructing the secret from published materials containing scattered references to portions
 7 of the information or of extracting it from public materials unlikely to come to the attention of
 8 the appropriator will not preclude relief against the wrongful conduct....” *Nosal*, 844 F.3d at
 9 1042 (citations omitted). Thus, Defendants' contention that the information in the TCCA
 10 email can be reverse-engineered by proper means is without merit.

11 ***Exhibit B: FAA Website Search Results.*** This exhibit reflects a summary of FAA
 12 publications and is properly considered part of Bombardier's trade secret compilation.
 13 Without the benefit of hindsight, Bombardier invested the time and resources to discover this
 14 model name and attendant search results amidst the sea of potentially determinative
 15 regulations to ascertain this model name and associated documents. Bombardier's competitors
 16 should not gain an unfair advantage by looking over Bombardier's shoulder to learn this
 17 information.

18 ***Exhibit F: “Ducted Smoke Det” Email.*** Mr. Borfitz testified that the information in
 19 this exhibit “provides valuable guidance for potential competitors of Bombardier.” (Borfitz
 20 Decl., Dkt. # 197, ¶ 11.) Yet Defendants maintain that because the PDF attachment to the
 21 email appears to originate from a third party, Bombardier cannot claim it as part of its trade
 22 secret compilation. (*See* Opp'n, Dkt. # 234, at 8.) Defendants cite no support for this
 23 proposition—and for good reason: it contravenes Ninth Circuit precedent. *See, e.g.*, *Nosal*,
 24 844 F.3d at 1042; *Kamakana*, 447 F.3d at 1179. Additionally, given Bombardier's history of
 25 successful aircraft certification, whether the information originated from a third party does not
 26 negate the inherent value in knowing that such information contributed to Bombardier's
 27 successful certification efforts. Moreover, Defendants fail to appreciate that if the information

1 labeled as “Confidential” truly does belong to a third party, the need to file such information
 2 under seal is even more pressing. (*See* First Page of Software Requirements Specifications for
 3 Ex. F, Dkt. # 216.) The information at issue would not be Bombardier’s to disclose publicly.

4 ***Exhibit G: “SSA Analysis” Email.*** Contrary to Defendants’ contention (Opp’n, Dkt. #
 5 234, at 9), Mr. Borfitz testified that the information in the SSA Analysis email is “particular to
 6 Bombardier” and that it provides “valuable information for potential competitors.” (Borfitz
 7 Decl., Dkt. # 197, ¶ 13.) This email therefore is another “source[] of business information”
 8 that would “harm [Bombardier’s] competitive standing”; and it therefore creates sufficient
 9 “compelling reasons to keep [the] document[s] sealed.” *Hill v. Xerox Corp.*, No. C12-0717-
 10 JCC, 2014 WL 1356212, at *2 (W.D. Wash. Apr. 7, 2014). Additionally, Defendants’
 11 observation that Bombardier did not initially formally designate this document as
 12 “Confidential/AEO” is irrelevant. (*See*, Opp’n, Dkt. # 234, at 9.) Bombardier designated it
 13 “Confidential/AEO” just a few hours after initial production. (*See* Correspondence between
 14 Counsel for MITAC and Bombardier, Dkt. # 196-4.)

15 ***Exhibit H: Supplier CID Email.*** Defendants again misguidedly use hindsight to argue
 16 that the particular identification codes and CIDs shown in the un-redacted Exhibit H can be
 17 readily found through simple internet searching. (Opp’n, Dkt. # 234, at 9-10.) Ironically,
 18 Defendants’ search confirms how simple it would be for a competitor to identify
 19 determinative identification codes and CIDs *only after* someone else divulges that
 20 information to guide the search. This accordingly confirms that this exhibit “provides value to
 21 competitors in the aviation industry” because “it provides certification insight.” (Borfitz
 22 Decl., Dkt. # 217, ¶ 10.) This is precisely why Bombardier seeks to seal this information.

23 ***Exhibit I: Keith Ayre Email Log.*** The same reasons provided above with respect to
 24 Exhibit A apply to Bombardier’s requested redaction of the subject line on page 1 of 17. The
 25 modest redaction to one email subject line, proposed by Bombardier, properly balances
 26 Bombardier’s need to protect that information against the public’s right to access court
 27 records. (*Compare* Dkt. # 216, *with* Dkt. # 196-9.)

1 ***Exhibit K: “Technical Knowledge Gaps” Email.*** Defendants’ assertion is misplaced
2 insofar as it contends that Bombardier and Mr. Borfitz did not explain why this exhibit
3 contains Bombardier’s trade secrets. (*See Opp’n*, Dkt. # 234, at 10-11.) This is not the correct
4 inquiry, as information need not constitute trade secrets to qualify for sealing from the public
5 record. (*See Order*, Dkt. # 111, at 14; *see also* LCR 5(g) (stating that even “confidential” and
6 “sensitive” information may be properly sealed.)) Regardless, Bombardier and Mr. Borfitz
7 explained why the redacted portions of Exhibit K (*compare* Dkt. # 216, *with* Dkt. # 196-11)
8 would enable competitors to target individuals with knowledge particularly relevant for
9 aircraft certification without having to engage in the same analysis that is demonstrated in
10 Exhibit K. (*See* Borfitz Decl., Dkt. # 217, ¶ 10.) Bombardier has a legitimate interest in
11 keeping this confidential information sealed and would be prejudiced if its proposed
12 redactions are not adopted.

II. CONCLUSION

For the foregoing reasons, Bombardier's Motion to Seal should be granted.

27 Dated this 14th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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